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POST-NEWSWEEK
STATIONS, INC.



March 2, 1999

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Susan Ness
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Michael K. Powell
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Gloria Tristani
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Grandfathering of LMAs, MM Docket No. 91-221, MM Docket No. 87-8**

Dear Chairman Kennard & Commissioners:

During the February 12, 1999 *en banc* hearing on the Commission's pending review of its local television ownership rules in MM Docket Nos. 91-221 and 87-8, Commissioner Furchtgott-Roth read into the record portions of a February 11, 1999 letter from Senators McCain and Burns and Representatives Bliley, Tauzin and Dingell (the "February 11th letter"). He asked two participants in the hearing whether they thought the letter was dispositive of the grandfathering issue before the Commission.

In their letter, the Senators and Congressmen asserted that "all [television] local marketing agreements (LMAs) have been grandfathered, *permanently*." The letter cites Section 202(g) of the 1996 Telecommunications Act (the "1996 Act"), "report language explaining this provision," and the 1997 Budget Reconciliation Act. Post-Newsweek Stations, Inc., participated in the *en banc* hearing, but our witness Alan Frank of WDIV-TV, Detroit, Michigan, was not asked to comment on the points raised in the February 11th letter. I would like to do so here.

I.

**Section 202(g):** Section 202(g) of the 1996 Act states that "[n]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission." This provision makes clear what the legislation was not intended to do, i.e., prohibit grandfathering; it does not address what the Commission should do. It left to the Commission to decide whether and how to regulate them, including as appropriate prohibiting them, phasing them out, grandfathering them or permitting them.

At the time of the legislation, the Commission was in the midst of a rule making proceeding on local ownership rules and had already raised the prospect that LMAs involving control over 15% or more of a station's programming would be treated like ownership. The Commission noted at least as early as January, 1995, that it was considering applying this same radio LMA principle to television. *See In re Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rulemaking.* Accordingly, MM Docket Nos. 91-221, 87-8, 10 FCC Rcd. 3524, ¶¶ 138-40 (1995). Had Congress wanted to direct the Commission with respect to those deliberations, that was an appropriate time to do it. Instead, the only statutory provision it enacted (202(g)) left the Commission entirely free to do what it thought best. The Commission's *Second Further Notice of Proposed Rulemaking* (the "*Second Further Notice*") also noted that Section 202(g) does not impose any limitation on its authority to promulgate rules for television LMAs or to decline to grandfather existing LMAs.

**The Conference Report:** The February 11th letter refers to the Conference Report as support for the proposition that Congress mandated the grandfathering of then existing LMAs. But the Supreme Court has made clear that the Commission may not look to the legislative history of the 1996 Act for its interpretation if the statute is clear on its face, as we believe is the case here. *See Davis v. Michigan Dep't of Treasury,* 489 U.S. 803, 808 n.3 (1989); *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). Moreover, as noted in the *Second Further Notice,* there is no support in Section 202(g) for the passing statement in the Conference Report, added at the last moment, that the conferees intended to grandfather then current LMAs.

**Budget Reconciliation Act:** The February 11th letter also cites a statement contained in the Conference Report for the 1997 Budget Reconciliation Act (the "1997 Budget Act"), in which the conferees referred to the "permanent" grandfather requirement for LMAs "as provided in the [1996 Act]." But long-standing rules of statutory construction prohibit the Commission from relying on a passing reference to a

statute made in the legislative history of an unrelated, subsequent piece of legislation. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 n. 13 (1980) (Rehnquist, J.) (stating that a "mere statement" in a subsequent committee report provides "an extremely hazardous basis for inferring the meaning of a congressional enactment"); see also *South Carolina v. Regan*, 465 U.S. 367, 380 n. 17 (1984).

**II.**

The February 11th letter goes on to state that existing LMAs should be "renewable and freely transferable." It emphasizes that "[a]ny restrictions, such as imposing a term of years, limiting transferability, or limiting an LMA to its initial contract term are flatly inconsistent with the concept of 'grandfathering.'" But the reference in the Conference Report does not specify the duration of any grandfathering of existing LMAs. It simply states that § 202(g) "grandfathers LMAs currently in existence." Accordingly, it is inappropriate to assume that the Conference Report addresses the extent of any grandfathering of LMAs. Also, the Report language by its terms refers only to existing LMAs, i.e., those in effect at the time of the legislation – not those that came into effect afterwards.

Grandfather provisions do not necessarily involve the permanent exemption from a statute's reach. A grandfather clause may "permit[] a *temporary* right to do a prohibited thing." *Wisconsin Wine & Spirit Institute v. Ley,* 416 N.W.2d 914, 919 (Wis. Ct. App. 1987) (striking down on equal protection grounds a statute which included a *permanent* grandfather provision) (emphasis added); see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 468 (1981) (noting that the legislation grandfathered existing entities "at least temporarily"); *Environmental Defense Fund v. EPA,* 82 F.3d 451, 455-56 (D.C. Cir.) (analyzing a grandfather provision that temporarily exempted entities from provisions of the Clean Air Act), *amended,* 92 F.3d 1209 (D.C. Cir. 1996). Thus, even if the Commission should decide to grandfather LMAs that were in effect in November 1996, a temporary exemption from regulation would not be "flatly inconsistent with the concept of grandfathering" at all. The same is true for restrictions on transferring or renewing LMAs.

Finally, television stations have been on notice at least since the radio ownership regulations were adopted in 1992 that, like radio LMAs, television LMAs might be treated as ownership interests at a future date. The Commission again indicated in January, 1995 and November, 1996 that it was considering enacting regulations restricting television LMAs and counting them as ownership interests. Any LMAs entered into after November, 1996 clearly should not be exempted from future LMA regulations, as the parties that entered into such agreements were placed on notice and

long as seven years ago the Commission forecasted its inclination to regulate television LMAs rebuts the argument that applying new LMA regulations to existing LMAs would be an improper *post hoc* application.

* * *

The language of the 1996 Act is clear on its face. The Commission has been directed to review its current television ownership limitations and modify them, if appropriate. In connection with that review, the Commission is free to adopt regulations governing LMAs in order to protect and promote localism. While the Commission has the discretion to grandfather existing LMAs for a period of time after any new rules are adopted, it is not statutorily bound to do so. Nor is it bound to permit indefinite extensions of grandfathered LMAs.

Sincerely,

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Post-Newsweek Stations, Inc.

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